

## CIVIL COVER SHEET

JS 44 - No. CALIF. (Rev. 4/97)

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO)

## I.(a) PLAINTIFFS

OPERATING ENGINEERS HEALTH AND  
WELFARE TRUST FUND FOR NORTHERN  
CALIFORNIA, et al.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF  
(EXCEPT IN U.S. PLAINTIFF CASES)

Oakland

## DEFENDANTS

RYAN McCLURE EXCAVATION, INC.

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Shaamini A. Babu, Saltzman & Johnson Law Corporation  
44 Montgomery Street, Suite 2110  
San Francisco, CA 94105

ATTORNEYS (IF KNOWN)

## II. BASIS OF JURISDICTION (PLACE AN "✓" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☒ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "✓" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

(For diversity cases only)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. ORIGIN

(PLACE AN "✓" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from Another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## V. NATURE OF SUIT (PLACE AN "✓" IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury Med Malpractice <input type="checkbox"/> 365 Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability  <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth In Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other  <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt Relations <input type="checkbox"/> 730 Labor/Mgmt Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input checked="" type="checkbox"/> 791 Empl.Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))  <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (US Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 990 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motion to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

## VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Action for the collection of delinquent contribution payments under Employee Retirement Income Security Act (29 USC Sections 1001, et seq.)

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$

☐ CHECK YES only if demanded in complaint:

UNDER F.R.C.P. 23

JURY DEMAND: ☐ YES ☐ NO

## VIII. RELATED CASE(S) IF ANY PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE A "✓" IN ONE BOX ONLY) ☒ SAN FRANCISCO/OAKLAND ☐ SAN JOSE

DATE

5/9/08

SIGNATURE OF ATTORNEY OF RECORD

8

Muriel B. Kaplan, Esq. (SBN 124607)  
Michele R. Stafford, Esq. (SBN 172509)  
Shaamini A. Babu, Esq. (SBN 230704)  
SALTZMAN & JOHNSON LAW CORPORATION  
44 Montgomery Street, Suite 2110  
San Francisco, CA 94104  
(415) 882-7900  
(415) 882-9287 – Facsimile  
mkaplan@sjlawcorp.com  
mstafford@sjlawcorp.com

Attorneys for Plaintiffs

E-filing

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
(OAKLAND DIVISION)

GIL CROSTHWAITE and RUSS BURNS, in  
their respective capacities as Trustees of the  
OPERATING ENGINEERS HEALTH AND  
WELFARE TRUST FUND FOR NORTHERN  
CALIFORNIA; PENSION TRUST FUND  
FOR OPERATING ENGINEERS;  
PENSIONED OPERATING ENGINEERS  
HEALTH AND WELFARE FUND;  
OPERATING ENGINEERS AND  
PARTICIPATING EMPLOYERS PRE-  
APPRENTICESHIP, APPRENTICE AND  
JOURNEYMEN AFFIRMATIVE ACTION  
TRAINING FUND; OPERATING  
ENGINEERS VACATION AND HOLIDAY  
PLAN; OPERATING ENGINEERS  
CONTRACT ADMINISTRATION FUND;  
OPERATING ENGINEERS JOB  
PLACEMENT CENTER AND MARKET  
AREA COMMITTEE ADMINISTRATION  
MARKET PRESERVATION FUND;  
OPERATING ENGINEERS INDUSTRY  
STABILIZATION FUND; BUSINESS  
DEVELOPMENT TRUST FUND; AND  
HEAVY AND HIGHWAY COMMITTEE,

Plaintiffs,

v.

RYAN McCLURE EXCAVATION, INC.,

Defendant.

Case No.:

08-02403

BZ

COMPLAINT

ADR

GO 44 SEC. 11  
NOTICE OF ASSIGNMENT  
TO MAGISTRATE JUDGE SENT

-1-  
COMPLAINT  
Case No.:

Parties

1. The Operating Engineers' Health and Welfare Trust Fund for Northern California; Pension Trust Fund for Operating Engineers (which includes the Pension Plan for the Pension Trust Fund for Operating Engineers, and the Operating Engineers Annuity Plan); Pensioned Operating Engineers' Health and Welfare Fund; Operating Engineers and Participating Employers Pre-Apprenticeship, Apprentice and Journeyman Affirmative Action Training Fund; and Operating Engineers Vacation and Holiday Plan are employee benefit plans as defined in the Employee Retirement Income Security Act of 1974 ("ERISA") § 3(3), 29 U.S.C. § 1002(3). Said plans and their respective trustees ("Trustees") are together referred to herein as "ERISA Plaintiffs." Gil Crosthwaite and Russ Burns are Co-Chairmen of the Joint Boards of Trustees of the ERISA Plaintiffs with authority to act on behalf of all Trustees.

2. Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO ("Union") is a labor organization as defined in § 2(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(5).

3. RYAN McCLURE EXCAVATION, INC. is an employer by virtue of ERISA § 3(5), 29 U.S.C. § 1002(5), and NLRA § 2(2), 29 U.S.C. § 152(2). Said entity is referred to herein as "Defendant."

Jurisdiction

4. Jurisdiction exists in this Court over the claims asserted by the ERISA Plaintiffs by virtue of ERISA § 502, 29 U.S.C. § 1132, in that the ERISA Plaintiffs seek to enforce the provisions of ERISA and the terms of their plans, seek to enjoin the acts and practices which violate ERISA, seek equitable relief to redress such violations, and seek all other appropriate relief under ERISA.

1           5.       Jurisdiction exists in this Court over all the claims by virtue of Labor Management  
2 Relations Act ("LMRA") § 301, 29 U.S.C. § 185, in that the Plaintiffs seek to enforce the terms  
3 and conditions of a written agreement between the Defendant and the Union.

4           6.       To the extent jurisdiction over any claim does not exist under ERISA or the  
5 LMRA, supplemental jurisdiction exists in this Court over such claims by virtue of 29 U.S.C. §  
6 1367 in that they arise out of a common nucleus of operative facts that form the basis of the  
7 federal claims asserted herein, each of which has a substantial ground in federal jurisdiction.  
8

9                               Venue

10          7.       Venue exists in this Court with respect to the claims under ERISA § 502 because  
11 all of the plans of the ERISA Plaintiffs are administered within this district and the breach took  
12 place in this district.

13          8.       Venue exists in this Court with respect to the claims under LMRA §301(a) because  
14 this Court has jurisdiction over the parties, as the Union maintains its principal place of business in  
15 this district, its duly authorized officers or agents are engaged in representing employee members  
16 in this district, and the claims arise in this district.  
17

18                               Intradistrict Assignment

19          9.       The basis for assignment of this action to this court's Oakland Division is that all of  
20 the events and omissions giving rise to Plaintiffs' claims occurred in the County of Alameda,  
21 where the ERISA Plaintiffs' funds and dues were administered during the period claimed herein,  
22 and where Defendant therefore failed to fulfill its statutory and contractual obligations to the  
23 ERISA Plaintiffs.  
24

25 ///

26 ///

27 ///

28



Bargaining Agreement

10. On August 21, 2007, the Union and Defendant entered into a Memorandum Project Agreement, referred to herein as "Project Agreement", requiring Defendant to make contributions to the ERISA Plaintiffs' funds, to the Union for union dues and to other Trust Funds. Defendant's obligations are more fully described in the Master Construction Agreement for Northern California ("Bargaining Agreement") between the Union and the Associated General Contractors of California, Inc., which is incorporated by reference into the Project Agreement. The ERISA Plaintiffs and Trust Funds are third party beneficiaries of both agreements.

11. The Operating Engineers Job Placement Center and Market Area Committee Administration Market Preservation Fund; Operating Engineers Contract Administration Fund; Operating Engineers Industry Stabilization Fund; Supplement Dues; Business Development Trust Fund; and Heavy and Highway Committee, together referred to herein as "Trust Funds," are funds for which the Trustees are the assignees of monies due under the Bargaining Agreement.

12. Under the terms of the Bargaining Agreement and of the governing documents of the ERISA Plaintiffs which documents are incorporated into the Bargaining Agreement and made binding on Defendant, Defendant is required to submit monthly reports of hours worked by its employees, and to regularly pay to the ERISA Plaintiffs, to the Union for union dues, and to the Trust Funds, certain sums of money, the amounts of which are determined by the hours worked by employees of Defendant, all as more fully set forth in the Bargaining Agreement. Also under the terms of the Bargaining Agreement and the governing documents of the ERISA Plaintiffs, Defendant agreed to pay liquidated damages for each delinquent payment. Defendant further agreed to pay interest on the combined delinquent contributions plus liquidated damages at the rates specified in the Bargaining Agreement, from the day immediately following the date that

each such payment became due until paid in full, all as more fully set forth in the Bargaining Agreement.

13. Under the terms of the Bargaining Agreement and of the governing documents of the ERISA Plaintiffs incorporated into the Bargaining Agreement and made binding on Defendant, Defendant is also required to permit an authorized representative of the ERISA Plaintiffs to examine such records of Defendant as is necessary to determine whether Defendant has made full payment of all sums owed to the ERISA Plaintiffs, all as more fully set forth in said governing documents, as amended, and incorporated into the Bargaining Agreement.

### Facts

14. Defendant has a statutory duty to timely make required payments to the ERISA Plaintiffs under ERISA § 515, 29 U.S.C. § 1145.

15. Defendant has become delinquent on all contributions due for the hours worked by its employee for the period from September 2007 through November 2007. Defendant has failed to pay said contributions plus liquidated damages and interest, all owed to the ERISA Plaintiffs, despite repeated demands.

16. In addition to the contributions owed, on several occasions, demands were made on Defendant on behalf of the ERISA Plaintiffs, to schedule an audit and provide records for examination pursuant to the terms of the Bargaining Agreement and the governing documents of the ERISA Plaintiffs, for the period from August 1, 2007 through date of audit.

17. Defendant has failed to pay the contributions owed and has refused and continues to refuse to permit an authorized representative of the ERISA Plaintiffs to examine Defendant's records as necessary to determine whether Defendant has made full payment of all sums owed to the ERISA Plaintiffs for the period August 1, 2007 through date of audit.

1           18. Defendant's failure and refusal to make payments and to provide records and  
2 permit examination of its records as alleged herein to determine if Defendant has met its  
3 obligations was at all times, and still is, willful. Defendant continues to breach said Bargaining  
4 Agreement, and the governing documents of the ERISA Plaintiffs incorporated into the  
5 Bargaining Agreement and made binding on Defendant, by failing to pay all amounts owed and to  
6 permit examination of its records as alleged. Said refusal is unjustified and done with malicious  
7 intent.  
8

9           19. Plaintiffs are without an adequate remedy at law and will suffer continuing and  
10 irreparable injury, loss and damage unless Defendant are ordered specifically to perform all  
11 obligations required on Defendant's part to be performed under ERISA, 29 U.S.C. §§ 1101-1381,  
12 the LMRA, 29 U.S.C. §§ 141-197, the Bargaining Agreement, and the governing documents of  
13 the ERISA Plaintiffs referred to therein, and are restrained from continuing to refuse to perform as  
14 required thereunder.  
15

16           20. This Court is authorized to issue injunctive relief based on traditional standard. As  
17 set forth above, Plaintiffs have a strong likelihood of success on the merits. There is the  
18 possibility that the Trustees and the participants will suffer irreparable injuries. The balance of  
19 hardships and advancement of public interest favor Plaintiffs.  
20

21                           Prayer

22           WHEREFORE, Plaintiffs pray as follows:

23           1. For judgment against Defendant for all contributions owed for hours worked by its  
24 employees for the period from September 2007 through November 2007.

25           2. For an order requiring Defendant to provide certain records and to submit to an  
26 audit of such records by a date certain for the period August 1, 2007 through date of audit; and  
27  
28

1           3.       For judgment against Defendant in favor of the ERISA Plaintiffs, Trust Funds, and  
2 the Union, in an amount equal to:

3                   a.       Any unpaid contributions, due at time of judgment, including, but not  
4 limited to, any contributions determined as due by said audit of Defendant's records for the period  
5 August 1, 2007 through date of audit pursuant to ERISA § 502(g)(2)(A), 29 U.S.C. §  
6 1132(g)(2)(A);

7  
8                               (1)     To the ERISA Plaintiffs, in accordance with ERISA § 502(g)(2)(A),  
9 29 U.S.C. § 1132(g)(2)(A) and the Bargaining Agreement;

10                           (2)     To the Union, in accordance with the Bargaining Agreement;

11                           (3)     To the Trust Funds in accordance with the Bargaining Agreement;

12                   b.       Liquidated damages on the aforementioned unpaid and late paid  
13 contributions in accordance with the Bargaining Agreement, the governing documents of the  
14 ERISA Plaintiffs, and with respect to the ERISA Plaintiffs, ERISA § 502(g)(2), 29 U.S.C. §  
15 1132(g)(2).

16  
17                   c.       Interest on any unpaid and late paid contributions plus liquidated damages  
18 and on Union dues at the rates and in accordance with the Bargaining Agreement, the governing  
19 documents of the ERISA Plaintiffs and, ERISA § 502(g)(2)(B), 29 U.S.C. § 1132(g)(2)(B) with  
20 respect to the ERISA Plaintiffs, and the applicable legal rate with respect to dues and where  
21 otherwise appropriate.

22  
23           4.       For any additional contributions and dues payable to the ERISA Plaintiffs and the  
24 Trust Funds as third party beneficiaries of the Bargaining Agreement at time of judgment, plus  
25 interest and liquidated damages as above provided and in accordance with the Bargaining  
26 Agreement, the governing documents of the ERISA Plaintiffs and, with respect to the ERISA  
27 Plaintiffs, ERISA § 502(g)(2), 29 U.S.C. § 1132(g)(2).



5. ERISA Plaintiffs' reasonable attorneys' fees and costs of this action in accordance with ERISA § 502(g)(2)(D), 29 U.S.C. § 1132(g)(2)(D); and in accordance with the Bargaining Agreement, and with LMRA § 301, 29 U.S.C. § 185 for all Plaintiffs.

6. For an order,

(a) for all unpaid contributions due for hours worked as specified above and thereafter through judgment;

(b) requiring that Defendant complies with its obligations to Plaintiffs under the terms of the Bargaining Agreement and the governing documents referred to therein;

(c) enjoining Defendant from violating the terms of those documents and of ERISA; and

(d) enjoining Defendant from disposing of any assets until said terms have been complied with, and from continuing or operating of Defendant's business until said terms have been complied with.

7. That the Court retain jurisdiction of this case pending compliance with its orders.

8. For such other and further relief as the Court may deem just and proper.

Dated: May 9, 2008

SALTZMAN & JOHNSON LAW CORPORATION

By:

Shaamini A. Babu  
Attorneys for Plaintiffs